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Plea Bargaining: The Judicial Merry-Go-Round

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INTRODUCTION

The last decade has brought to our courts the increasing awareness that the criminal is winning the war against crime. He is not winning through cunning or guile, nor even with the aid of modern technology. He is winning because the sheer number of his comrades-in-arms is beginning to buckle our cumbersome system of justice. Realizing the need to relieve its congested dockets, the courts have resorted to various methods to expedite the legal process. One of these methods, plea bargaining, is not designed to accelerate the trial level but instead eliminate it. It has done just that with remarkable efficiency. Unfortunately the price for a more efficient system of justice is high, and too often paid by the very individuals who need its protection most. The purpose of this article is to examine plea bargaining in our courts and assess its impact upon the judicial system. The analysis will include the role of the trial judge in the bargaining process, problems involved in withdrawing a guilty plea, and reasons why the process is used so extensively today. The dangers of plea bargaining will also be examined in conjunction with recent Pennsylvania Supreme Court decisions.

The rise of plea bargaining to its present status has not been without controversy.[1] Its foes have wielded such verbal weapons as "denial of due process," and "unethical," which have been successfully countered by retorts of "necessary" and "efficient." Whatever the future of plea bargaining may be, one thing must be made absolutely clear—it is dangerously susceptible to abuse.

PLEA BARGAINING DEFINED

Plea bargaining is a process by which a defendant is induced to plead guilty for a consideration, and forgo his or her right to trial. Several questions are raised by this definition. First, what type of inducements are used? One method is to plead guilty to a lesser offense. For example,

1. *See generally*, Arnold, *Law Enforcement—An Attempt At Social Dissection*, 42 YALE L.J. 1 (1932); Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951); Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956); Weintraub and Tough, *Lesser Pleas Considered*, 32 J. CRIM. L.C. & P.S. 506 (1941); Comment, *The Influence of the Defendant's Plea on the Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956); Note, *Guilty Plea Bargaining: Compromise By Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

a person in Pennsylvania charged with assault with intent to maim[2] faces a possible $2,000 fine, five years in solitary confinement, or both. The accused will be offered a reduced charge of aggravated assault and battery,[3] carrying a $2,000 fine and/or three years imprisonment, or even simple assault and battery[4] consisting of a $1,000 fine and/or two years imprisonment in return for a plea of guilty. The defendant is not only assured of receiving a lighter punishment (and a greater probability of suspended sentence or probation) but also is spared the stigma of a felony conviction.[5] The penal codes of most states are conducive to this type of bargaining.[6] This amicable arrangement is based on one fundamental premise—that the defendant is initially guilty, or from all indications would have been found guilty, on all charges. This suggests one of the abuses to which plea bargaining may be subject. If a prosecutor desires a conviction, but does not feel the evidence will sustain one, he merely adds several unwarranted charges to the original ones in order to give himself some bargaining leverage for a guilty plea. If this method is used in good faith by the prosecutor, it is most advantageous to the accused. He is assured of a reduced sentence since the bargain is actually consummated at the arraignment. The problem of whether the judge will accept a recommendation is not present, and if the prosecutor does not uphold his end of the bargain, the defendant will be aware of it *before* he makes his plea. Any abuses by the prosecutor can in most cases be foreseen by the defendant's attorney.

Another inducement is that of recommending to the judge that the defendant be given a lighter sentence.[7] This method is not without its drawbacks. The accused runs the risk that the prosecutor will neglect to make the recommendation.[8] Even if it is made there is always the

2. PA. STAT. ANN. tit. 18, § 4712 (1963).
3. *Id.* § 4709.
4. *Id.* § 4708.
5. A felony conviction is a considerable threat to the recidivist since sentences may be doubled and even tripled with second and third offenses. *See* Ohlin & Remington, *Sentencing Structures: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).
6. In New York there are three types of assault: Assault in the third degree (max. 1 year); Assault in the second degree (max. 3 to 7 years); Assault in the first degree (max. 3 to 15 years). N.Y. CONSUL. LAWS ANN. tit. 39, §§ 120.00, 120.05, 120.10 (McKinney 1967). In Illinois the crime of kidnapping is divided into three categories: Kidnapping (max. 1 to 5 years); Aggravated Kidnapping (max.-death); Unlawful Restraint (max. $500 fine, 1 year or both). ILL. STAT. ANN. ch. 38 §§ 10-1, 10-2, 10-3 (1964).
7. Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780, 787 (1956):
> This ordinarily occured in cases where the offense in question carried statutory degrees of severity such as homicide, assault, and sex offenses.

8. Commonwealth v. Alvarado, 442 Pa. 516, 276 A.2d 526 (1971). The prosecutor failed

possibility that the court may not heed the appeal.[9] Studies have shown, however, that generally the judges do heed these recommendations. One finding showed that of a group of federal district court judges who believed the plea relevant in sentencing procedures, 84% indicated that a defendant pleading guilty would be given a lighter sentence.[10] The reason for this attitude among judges is the belief that a defendant pleading guilty is attempting to atone for his wrong, and is thus less culpable than the accused who flaunts his innocence till the end.[11] Another theory is that the judge is not prejudiced by the inflamatory details of the crime given by the prosecutor.[12]

It is this latter method which has caused the greatest concern to liberal legal scholars. Upon initial reflection one envisions the courtroom scene of a soap opera where the assistant district attorney approaches the hardened criminal and in a tough but compassionate voice says, "Throw yourself on the mercy of the court and I'll do everything I can to see the judge goes easy on you." This may have been the birth of the modern day plea bargain but since then it has developed ramifications far beyond what was initially intended.

Another problem of importance in relation to plea bargaining is by whom is it done, and for what reasons? These two questions have been a source of some consternation within the courts themselves.

In answer to the former question, there is little doubt that the main ingredient to any bargaining venture is the prosecutor. It is he who sets the legal machine in motion, and it is he who can put a stop to it or at least shorten its duration. Due process and the judicially inherent sense of fair play require that the defense counsel also be present in the bargain.[13]

Role Of The Judge

The serious issue revolves around the role of the trial judge. The Pennsylvania Supreme Court has stated that "for a judge to make a bargain, engagement or promise in advance of the hearing of the case

to recommend to the judge as promised that defendant receive life imprisonment instead of death.

9. Commonwealth v. Banmiller, 193 Pa. Super. 411, 165 A.2d 121 (1960).

10. Comment, *The Influence of the Defendant's Plea on the Judicial Determination of Sentence*, 66 Yale L.J. 204 (1956).

11. *Id.* at 209.

12. *Id.* at 218.

13. Cases have arisen involving instances where bargains have been made to defendants without their being represented by counsel. *See* Shelton v. United States, 242 F.2d 101 (5th Cir. 1957).

irrespective of what the evidence might thereafter show the facts to be and as to what judgment he should render therein, would be judicial misconduct."[14] The opinion goes on, however, to note by way of dictum that in the future, should a judge happen to discuss the disposition of a case with counsel for one side, he had better be sure the counsel for the opposing side is present.[15]

In 1966, the court gave its unofficial seal of approval to plea bargaining in *Commonwealth ex. rel. Kerekes v. Maroney*.[16] Citing *United States ex. rel. McGrath v. LaVallee*,[17] however, it qualified that approach with a veil of judicial rhetoric giving the concession an air of constitutional respectability.

> Our concept of due process must draw a distinct line between, on the one hand, advice and "bargaining" between defense and prosecuting attorneys and, on the other hand, discussions by judges who are ultimately to determine the length of the sentence imposed.[18]

More recently the case of *Commonwealth v. Evans*[19] came before the Pennsylvania Supreme Court. Citing *Kerekes*,[20] the majority again announced that any participation by the trial judge in a plea bargain is forbidden.[21] The reasons given by the court were first, that defendant will get the impression that he would not receive a fair trial if in fact he chose to have one. Secondly, the judge will not be able to objectively consider the voluntariness of the guilty plea. Thirdly, the defendant, not wanting to raise the ire of the judge, may plead guilty despite his alternative desires.[22] One federal court stated the problems in these terms:

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14. Commonwealth v. Senauskas, 326 Pa. 69, 71, 191 A. 167, 168 (1937). *See also* Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964) where the court held that defendant was entitled to withdraw his plea where defense counsel claimed one judge of a three-judge court had made a commitment against the death penalty which defendant had relied upon.

15. Commonwealth v. Senauskas, 326 Pa. 69, 71, 191 A.2d 167, 168 (1937).

16. 423 Pa. 337, 349, 223 A.2d 699, 705 (1966):
While we are not willing to completely proscribe plea bargaining, we do recognize that the awesome effect of a guilty plea and the sensitive nature of the bargaining process makes certain safeguards essential.

17. 319 F.2d 308 (2d Cir. 1963) (dissenting opinion).

18. 423 Pa. 337, 349, 223 A.2d 699, 705 (1966).

19. 434 Pa. 52, 252 A.2d 689 (1969).

20. *Id.* at 54, 252 A.2d at 690.

21. The court cites Informal Opinion No. 779, A.B.A., Professional Ethics Committee: A judge should not be a party to advance arrangements for the deterimination of sentence, whether as a result of a guilty plea or a finding of guilty based on proof. A.B.A. MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Pleas of Guilty*, § 3.3 (Tent. Draft, February, 1967).

22. Commonwealth v. Evans, 434 Pa. 52, 54, 252 A.2d 689, 690 (1969). *See* 8 DUQ. L. REV. 461 (1970).

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his rights to trial and is convicted, he faces a significantly longer sentence.[23]

Dissenting in the *Evans* case, Justice Bell takes a more pragmatic view.[24] Since the judge is going to hear the recommendations from the district attorney in any event, he should be a party to the conference from its inception. Not only would the process be brought into the open, away from "chicanery, partiality, politics or compulsion,"[25] but it also would expedite litigation and help to relieve the great backlog of criminal cases.[26] Perhaps realizing what he has suggested in his dissent is not totally in line with a system of justice based upon due process of law, Bell states "parenthetically" in a footnote that "the law is well settled that a trial Judge is not bound by any agreement between the defense counsel and the district attorney that if a guilty plea is entered, the district attorney will agree to or will recommend a specific sentence, nor would he be bound even if he had participated in the conference."[27] What the Justice is objecting to is the abolition of the long standing practice in Pennsylvania for the trial judge to be present but not actively participate in a plea bargain. He fails to recognize that the judge's participation in the bargaining process has a dramatic impact upon the defendant. Whether the defendant believes that the judge is participating in the actual decision or not is irrelevant, since he does believe that the judge must have acquiesced in the final determination. The fact the judge makes a special point, before the plea is given, to inform the accused that he, as judge, is in no way bound by the recommendations is also of little importance. It appears to the defendant that this is done purely for the sake of judicial propriety.

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23. United States *ex. rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D. N.Y. 1966).
24. Commonwealth v. Evans, 434 Pa. 52, 57, 252 A.2d 689, 692 (1969).
25. *Id.* at 57, 252 A.2d at 692.
26. Justice Bell pointed out that as of April 1, 1969, the criminal courts of Philadelphia County had a backlog of 284 untried homicide cases, at least 50% of which should be disposed of by plea bargaining. *Id.* at 58, 252 A.2d at 692.
27. *Id.* at 58 n.*, 252 A.2d at 692 n.*.

In analyzing the court's position, it can be seen that the Justices are divided between their duty to insure every defendant his constitutional right to a trial by jury,[28] in accordance with due process,[29] and recognition that something must be done to relieve the great congestion of pending criminal cases. The solution offered is that under no circumstances may a judge participate or be bound by a plea bargain, however, in the interest of expediency he should consider any such agreements made between the prosecution and the defense. It is submitted that although this may be a laudable compromise, it may in fact handicap both interests. This amicable agreement between the two attorneys and the defendant, coupled with a judicial wink from the court, may be subject to some very fundamental abuses of judicial propriety and fair play.

COMMONWEALTH V. WILKINS

In some instances the plea bargain attempt may serve to even further delay the system it was meant to expedite. The case of *Commonwealth v. Wilkins*[30] displayed both the confusion and failure of purpose to which plea bargaining is susceptible. The defendant in this instance was indicted in a purse snatching case, for assault and battery, assault with intent to rob, and robbery.[31] There seemed little doubt that Wilkins was the one involved since he was identified both by the victim, and by a card with his name on it found in the victim's hand bag when it was returned. This in itself says something about the defendant's ability to make a rational judgment as to the significance of a plea bargain.[32] These factors coupled with the defendant's prior juvenile record led the defense counsel and prosecutor to the conclusion that there was little chance for acquittal. They suggested to Wilkins that if he pleaded guilty, the Commonwealth would recommend a sentence of from eleven and one-half to twenty-three months on the robbery bill, and a year's probation on the assault and battery bill. Apparently, Wilkins facing a possible term of twelve years imprisonment,[33] decided

28. U.S. CONST. amend. VI & VII.
29. *Id.* amend. XIV.
30. 442 Pa. 524, 277 A.2d 341 (1971).
31. In Pennsylvania, the charges of assault with intent to rob, and robbery, should be combined under the heading *Robbery and Robbery by Assault and Force*, PA. STAT. ANN. tit. 18, § 4704 (1963).
32. The possibility that the victim was mistaken in her identification and that Wilkins had been framed by the real assailant was not pursued.
33. PA. STAT. ANN. tit. 18, § 4704 (1963), *Robbery and Robbery by Assault and Force*

under the circumstances to accept the bargain. Before making his plea, defendant made a statement to the court that he was promised nothing and that he fully understood the nature of the offense against him, and that he "could be sent away . . . for a long time."[34] At that time the prosecuting attorney made his recommendation at a side bar conference but no such recommendation ever appeared on the record. Due to the preparation of the pre-sentence report, a sentence was not actually handed down till four months later. A different prosecuting attorney was assigned to the sentence hearing who had only a vague notion of a recommendation which had been made in behalf of defendant. The judge also had forgotten the recommendation which was never again brought to his attention. Wilkins was then sentenced to eighteen months to fifteen years on the robbery charge.[35] Suggestions of shorter minimum sentences were offered by both the defense counsel and the prosecution, but never was the specific recommendation made as promised. Upon appeal, it was discovered that defendant had been "coached" by the two attorneys into telling the judge that he had been promised nothing and that his plea was voluntarily made.[36]

The Supreme Court of Pennsylvania, in accordance with the majority of states,[37] held that a defendant may withdraw[38] a plea of guilty when a promise to recommend a lenient sentence is not kept by the prosecutor.[39] For a trial judge to rule any other way would be an abuse

carries a ten year maximum sentence; *Id.* § 4708 (1971), *Assault and Battery* carries a two year maximum sentence.

34. Commonwealth v. Wilkins, 442 Pa. 524, 526, 277 A.2d 341, 342 (1971).

35. The fifteen year maximum is five years longer than is allowed by state law. PA. STAT. ANN. tit. 18, § 4704 (1963), *Robbery and Robbery by Assault and Force* carries a ten year maximum sentence.

36. Commonwealth v. Wilkins, 442 Pa. 524, 529-30, 277 A.2d 341, 343-44 (1971). Upon post-conviction hearing, defendant, upon interrogation by his own counsel, stated:

Q. Did they tell you anything about how you should respond to the question the judge would present before the court? Now, specifically, when the judge said, 'Are you doing this voluntarily or have any promises been made to you' did they tell you how to answer those questions?

A. Yes.

Q. What did they tell you to say?

A. They told me I was being asked, and when asked was there any deal or bargaining made I was to say, no.

37. Commonwealth v. Alvarado, 442 Pa. 516, 522, 276 A.2d 526, 529 (1971). Decisions among the majority which allow a change of plea for a broken promise: White v. Gaffney, 435 F.2d 1241 (10th Cir. 1970); People v. Fratianno, 6 Cal. App. 3d 211, 85 Cal. Rptr. 755 (1970); State v. Wolske, 280 Minn. 465, 160, N.W.2d 146 (1968); People v. Sigafus, 39 Ill. 2d 68, 233 N.E.2d 386 (1968); State v. Reppin, 35 Wis. 2d 377, 151 N.W.2d 9 (1967).

Decisions among the minority which do not allow a change of plea for a broken promise: People v. Chadwick, 33 App. Div. 2d 687, 306 N.Y.S.2d 182 (1969); Courtney v. State, 341 P.2d 610 (Okla. Ct. App. 1959).

38. *See* Commonwealth v. Scoleri, 415 Pa. 218, 247-48, 202 A.2d 521, 536 (1964) for general propositions as to when withdrawal is or is not legally justifiable.

39. Commonwealth v. Wilkins, 442 Pa. 524, 529, 277 A.2d 341, 343 (1971); *See also*

of discretion. More importantly the court stated that a shy recommendation to the trial judge at side bar would not be sufficient in upholding the Commonwealth's end of the bargain. Any recommendation must be made audibly to the court and placed on record.[40] The court went on to note:

> In the future, if a defendant or his counsel wish to protect a bargain they received for a plea, when the court asks the defendant if any promises were made to him, the defendant should answer in the affirmative, stating that the district attorney's office promised that they would make the specific recommendation which had, in fact, been promised. The court should then make it clear to the defendant that he is not bound by the district attorney's recommendation and at that time allow that defendant to plead guilty or go to trial.[41]

Justice Jones wrote a dissenting opinion[42] in which he attempted to correct the court on one important point. When a defendant pleads guilty, whether he has been promised anything or not, he presumably is admitting his complicity in the crime he has been charged with. It is anomolous to later allow him to withdraw that plea. After all, a man is either guilty or he is not. The only change that should be made according to the Justice is to allow the recommendation (eleven and one-half to twenty-three months) to to take the place of the actual sentence of eighteen months to fifteen years. He also concurs with the majority but adds:

> Whenever a trial judge is informed by the accused of a desire to plead guilty, any proposed bargains should be brought to light before a guilty plea is entered. At that juncture, the judge may take evidence if he believes that concessions are unwarranted. If the judge then concludes he will not follow the agreement he should then so inform the accused before receiving any guilty plea.[43]

From August, 1967 when Wilkins was indicted to May 14, 1971 when the Supreme Court of Pennsylvania decided the case, was a period of almost four years which Wilkins spent in prison. He went

Commonwealth v. Alvarado, 442 Pa. 516, 276 A.2d 526 (1971); Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964); Commonwealth v. Todd, 186 Pa. Super. 272, 142 A.2d 174 (1958).

40. *Id.*
41. *Id.* at 532, 277 A.2d at 345.
42. *Id.*
43. *Id.* at 535, 277 A.2d at 346-47.

through an indictment, trail court, sentence hearing, post-conviction hearing, an appeal to the Superior Court and one to the Supreme Court of Pennsylvania only to find out that he must start all over at the trial level. He has cost himself and the state taxpayers hundreds of dollars for a crime amounting to a few dollars. All of this because of a desire to expedite litigation.

If the theory of the dissenting Justice in the *Wilkins* case is followed, the trial judge must inform the defendant whether or not he intends to follow the recommendation *before* the guilty plea is entered.[44] Although this eliminates the "casino-like game of chance,"[45] it brings about a most unconscionable situation. If the bargain is rejected, the guilty defendant will plead innocent, thus frustrating the purpose of the entire process. And if the bargain is accepted, it is submitted that the innocent defendant will be as coerced into pleading guilty as if he had been rubberhosed at the station house. This is especially true where the accused is offered probation or a suspended sentence. Even an innocent man will plead guilty and insure his freedom, rather than chance imprisonment after a conviction based on circumstantial evidence.[46] Although he has retained his freedom, he will be plagued for the rest of his life by the black mark of a felony conviction.

Reasons For Its Use

In order to scrutinize the process of plea bargaining, the reasons why it is done must be further explored. This entails two points of view, one from the side of the accusor (*i.e.*, prosecuting attorney, judge and society), and the other from the accused. Both can be summarized by one word—expediency.

The accusor is interested in plea bargaining primarily because of the circumstances first mentioned in the comment—the fact that it is becoming more and more difficult for a system of justice based upon due process for all to stem the tide of an ever increasing crime rate. One author wrote:

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44. *Id.* at 529, 277 A.2d at 343.
45. *Id.* at 533, 277 A.2d at 346.
46. Justice Roberts in defending plea bargaining made this statement:
Even when the evidence, although not overwhelming, is more than sufficient to sustain a conviction, it may well be in the defendant's best interest to plead guilty rather than to gamble and lose, when losing may result in the deprivation of liberty for an extended period of time or the death sentence.
Commonwealth v. Maroney, 423 Pa. 337, 348, 223 A.2d 699, 705 (1966).

> When a system is threatened by offenders demanding full, formal adjudication of their cases, it faces the alternatives of either not adjudicating many serious offenders or requiring greatly increased staff and other facilities. The former is not possible; the latter probably unrealistic. Particularly is this so when there is a known way of conforming to currently-acceptable objectives, with a relatively modest expenditure of time and money. This can be done by operating the system in a way that will encourage a large number of pleas of guilty.[47]

To be more specific, a number of reasons are given for the use and encouragement of plea bargaining by the accusor. For example, it is suggested as an aid in decreasing the number of trials.[48] This in turn will relieve the long term incarceration of some persons waiting trial.[49] Less facilities will be needed and thus fewer state employees to absorb taxes.[50] Also, defense counsels will not be spread so thin, and thus be better able to prepare for their client's cases.[51] When confronted with the constitutional perils of plea bargaining, its supporters will state that if the proper safeguards are maintained, the right of the accused will never be threatened. The most important safeguard is to insure that the plea is voluntarily and understandingly made by the defendant. The trial judge, before accepting the plea, should hear the evidence against the accused and determine how likely a conviction will be. If the prosecutor is likely to sustain his case, the judge should then make absolutely certain that the defendant fully understands the nature of the charge against him, the consequences that may follow and, most importantly, the fact that the recommendation of the prosecutor has no binding effect upon the judge.[52] As will later be developed, these safeguards may not be as effective as would first appear.

The reasons why the accused will accept a plea bargain are also varied. In some instances, the defendant will be afraid of antagonizing the sentencing officials or possibly that his record will be held against him by the jury.[53] He may believe that the judge will be more severe if subjected to a full scale trial.[54] Or the defendant may simply wish to

47. Ohlin & Remington, *Sentencing Structures: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495, 500 (1958).
48. Note, *Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas*, 112 U. PA. L. REV. 965, 881 (1964).
49. *Id.* at 882.
50. *Id.*
51. *Id.*
52. *Id.* at 884.
53. Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780, 783 (1956).
54. *Id.*

forgo all the embarrassment and inconvenience of a protracted trial. As uncontroversial as these reasons would seem, it must be noted that they all would provide a similar inducement even if recommendations had not been promised.

THE DANGERS OF PLEA BARGAINING

In reference to the above mentioned reasons it would appear that plea bargaining will continue to be a powerful tool in alleviating our over burdened courts. The process has been shown to be most effective, and in the majority of cases will produce results that are both efficient and justifiable. However, its limitations and dangers must be realized.[55] One major danger associated with plea bargaining is the irreconcilable results it sometimes gives. As was stated by one author:

> Modern penal theory holds that the interests of both society and the defendant are served by adjusting the sentence to reflect the individual's prospects for rehabilitation. But when defendants guilty of the same crime are awarded different sentences for administrative reasons, such a discrimination cannot be justified in terms of individual culpability.[56]

This raises a critical question—who is receiving the benefits of plea bargaining? It has been suggested that it is the recidivist because he is better able to use his past experience to obtain a lighter sentence.[57] In defense of this conclusion it could be argued that if anyone is entitled to the time and expense of a full trial, it must be the first offender. For the experienced criminal this can often foster disrespect for the effectiveness of the law.[58]

> A principal purpose for long sentences in felony cases is to deter persons from committing felonies. But when the seasoned criminal knows that he will be permitted to plead to a lesser charge and get a few months in the county jail, he may well conclude that it is worth his while to commit the crime in face of such light punishment.[59]

Even though some may argue that a criminal is rarely deterred by the

55. *Id.* at 789.
56. Comment, *The Influence of the Defendant's Plea on the Judicial Determination of Sentence*, 66 YALE L.J. 204, 219-20 (1956).
57. Newman, *supra* note 53 at 790.
58. *Id.*
59. Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 395 (1951).

possible consequences of his actions, the incongruity of a repeated offender receiving a lighter sentence than the one or two time loser still remains.

As with any process which can affect the destiny of another individual, it is subject to misuse and exploitation. One such misuse which has sprung from plea bargaining is the securing of a plea of guilty when the State has a weak case,[60] *i.e.*, where it is not likely that the evidence will sustain a conviction. A number of situations may give rise to a weak case. Crimes involving small or uncertain pecuniary amounts such as larceny of second-hand items, lack of credibility of the state's witnesses,[61] or inability to prove intent or premeditation in a homicide are a few examples.[62] Realizing that a conviction would not be sustained, the prosecutor might conceal his dilemma from the defendant and persuade him to plead guilty.[63] These procedures might, in many instances, be used to place the criminal behind bars who because of a procedural defect, or insufficient evidence, would otherwise be free. They may also be used to incarcerate one who under the eyes of the law is innocent. It is not suggested that these irreprehensible practices cannot be stopped by the careful scrutiny of the trial and appellate judges. It is submitted, however, that real danger lies in overlooking these unethical procedures in the name of a more efficient system of justice.

There is another danger inherent in plea bargaining which the most elaborate and conscientious safeguarding may not prevent.[64]

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60. Weintraub and Tough, *Lesser Pleas Considered*, 32 J. CRIM. L.C. & P.S. 506, 513 (1941).

61. *Id.* at 513:

> Since society brands drug addicts, prostitutes and persons with prior felony convictions as notorious or immoral, they are considered poor risks as witnesses. [A]lso the complainant who is reluctant to give testimony is of little value to the prosecution. This type of complainant is likely to be so involved himself, that, on second thought, he is anxious to have the indictment quashed; for example, a victim of a hold-up in a house of prostitution.

62. *See* PERKINS, CRIMINAL LAW 30-40 (1957).

63. Again, this may be accomplished by the prosecutor promising to make a recommendation of leniency, or by intentionally drawing up more charges than the facts call for and then offering to drop the unwarranted ones. Note that this latter tactic of the prosecutor is specifically prohibited by the ABA CODE OF PROFESSIONAL RESPONSIBILITY:

> DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
>
> (A) A public prosecutor or other governmental lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> (B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

64. This same danger is being confronted today in the area of confession of judgments.

> The concept of fairness and justice embodied in the fourteenth amendment to the Constitution of the United States is incompatible with the practice of permitting convictions based upon guilty pleas not made voluntarily and no plea can be viewed as voluntary that is produced of ignorance.[65]

The United States Supreme Court has stated, as far back as 1897, that a confession must be "free and voluntary; that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[66] More recently the Court has stated that the *Bram* decision "did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel."[67] Both the Supreme Courts of the United States and Pennsylvania have made it clear that the two elements of understanding and voluntariness are requisite before a guilty plea may be accepted.[68] It is submitted that even with these safeguards being applied in good faith, a certain element of unconscionability still exists.

The problem was first recognized in Pennsylvania in the 1930 case of *Commonwealth v. Patch*.[69] On an appeal before the Superior Court, the defendant, charged with forgery, was induced to plead guilty by the assurance of his attorney that sentence would be suspended and probation given. The accused at the time was painfully sick with duodenal ulcers and hemorrhages, and as a result was interested in the quickest solution available. Upon acceptance of his guilty plea, defendant was sentenced to four to eight years in the Eastern Penitentiary. On appeal, the plea was permitted to be withdrawn, "if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act, or was influenced unduly and improperly either by hope or fear in the making of it, or if it appears that the plea was entered under some mistake or misapprehension."[70] The Pennsylvania Supreme Court later renounced the "broad enunciation"[71] of the *Patch* case but did

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See Swarb v. Lenox, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1971).

65. Commonwealth v. Myers, 423 Pa. 1, 5-6, 222 A.2d 918, 921 (1966). *See also* Machibroda v. United States, 368 U.S. 487 (1962).

66. Bram v. United States, 168 U.S. 532, 542-43 (1897); Malloy v. Hogan, 378 U.S. 1 (1964).

67. Brady v. United States, 397 U.S. 742 (1970).

68. Commonwealth v. Rundel, 428 Pa. 102, 237 A.2d 196 (1968); Machibroda v. United States, 368 U.S. 487 (1962); Brady v. United States, 397 U.S. 742 (1970).

69. 98 Pa. Super. 464 (1930).

70. *Id.* at 469.

71. Commonwealth v. Kirkland, 413 Pa. 48, 55, 195 A.2d 338, 341 (1963).

state that "the withdrawal of the plea of guilty should not be denied in any case where it is apparent that the ends of Justice will be served by permitting not guilty to be pleaded in its place."[72] In that case, the defendant, Catherine Kirkland, pleaded guilty to murder on the assurance of the assistant district attorney that a recommendation would be made to the court at the conclusion of the Commonwealth's evidence that a sentence only be imposed for voluntary manslaughter.[73] She was also advised by her counsel that although the judge was not bound to follow the recommendation, "leniency was ordinarily extended to individuals of her age, extreme poor physical condition, and previous good character and reputation."[74] Despite the recommendation, the judge, after hearing the evidence against her, found her guilty of second degree murder and sentenced her to imprisonment from four to eight years. On appeal, the Supreme Court noted that the trial judge "catechized" the accused in order to make certain she understood the nature and effect of her plea.[75] It then held that withdrawal of a plea of guilty based upon misapprehension of material facts or of the law was not justifiable where the defendant wished to change her plea merely because her expectations as to the sentence were not realized.[76] Although *Kirkland* indicated a new hardline approach on the withdrawal of guilty pleas after a bargain had been made, the case was distinguishable in that the motion to withdraw was not made until after the sentence had been given. Traditionally, the federal government has been less likely to allow a post-sentence withdrawal than a pre-sentence withdrawal.[77]

In *Commonwealth v. Scoleri*,[78] the court held that although withdrawal of a guilty plea was proper when "not made freely and voluntarily" or "where the plea was entered by mistake,"[79] it was not legally justifiable where it is entered "(a) under the belief that as a result of

72. *Id.*
73. *Id.* at 51, 195 A.2d at 339. Prosecutor admitted to defense counsel that there was not sufficient evidence in his opinion to sustain a conviction for murder.
74. *Id.* at 53, 195 A.2d at 340.
75. *Id.* at 51, 195 A.2d at 339.
76. *Id.* at 56-57, 195 A.2d at 341-342. *Accord*, Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959); Commonwealth v. Banmiller, 193 Pa. Super. 411, 165 A.2d 121 (1960).
77. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Pleas of Guilty:*
§ 2.1(a)—The court should allow the defendant to withdraw his plea of guilty . . . whenever the defendant, upon timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
§ 2.1(b)—Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.
78. 415 Pa. 218, 202 A.2d 521 (1964).
79. *Id.* at 247, 202 A.2d at 536.

such plea he will receive life imprisonment or lenient treatment, or (b) where he and his lawyer had erroneously drawn the conclusion that he will not receive a penalty of death or a severe penalty, or (c) where his lawyer and the district attorney have agreed upon the exact crime which he has committed and the penalty to be imposed. . . ."[80] Two years later it was decided that a defendant was entitled to a post-conviction hearing on the voluntariness of his plea where his counsel had urged him to plead guilty, but never explained the consequences of such a plea.[81]

In 1970, the Pennsylvania Supreme Court laid to rest any ambiguity about whether or not a court could deny a pre-sentence motion for withdrawal. In *Commonwealth v. Culbreath*,[82] defendant pleaded guilty to murder. Before sentencing Culbreath petitioned for leave to withdraw his plea of guilty on the grounds that he was under a misapprehension as to the sentence which was to be imposed. Defendant pleaded not guilty at his arraignment, but before trial, defense counsel, the prosecutor and the judge all met in chambers to discuss the fate of Culbreath. He was later told by his counsel that if he pleaded guilty, the assistant district attorney would recommend that he receive a maximum sentence of two years and that "the probabilities" were good that the judge would follow it.[83] The judge did not accept the recommendation and sentenced him to from six to twelve years. The Supreme Court upheld the decision for much the same reasons as in *Kirkland*.

> We are convinced from the record that the defendant fully understood the nature of the crime with which he was charged and his rights, and the possible sentences which could be imposed and the consequences of his guilty plea, and that his sole reason for attempting to have it withdrawn is his disappointment in the length of sentence imposed.[84]

Justice Roberts dissented, expressing the federal philosophy that a defendant should be permitted to withdraw his plea of guilty before sentencing if a fair and just reason is given for withdrawal.[85]

It is submitted that Pennsylvania is leading its defendants down a dangerous road. Culbreath did what perhaps most people would do

80. *Id.* at 248.
81. Commonwealth v. Myers, 423 Pa. 1, 222 A.2d 918 (1966). *See also* Commonwealth v. Metz, 425 Pa. 188, 228 A.2d 229 (1967).
82. 439 Pa. 21, 264 A.2d 643 (1970).
83. *Id.* at 27, 264 A.2d at 645.
84. *Id.* at 28, 264 A.2d at 646.
85. *Id.* at 29, 264 A.2d at 647.

in his position. First, he was asked whether or not he desired to plead guilty to murder. He was told that the penalty for first degree murder was death or life imprisonment. The penalty for the more likely finding in his case, second degree murder, was imprisonment in solitary confinement for a term not to exceed twenty years. For manslaughter, the term can run from three to twelve years. On the advice of his counsel, and what he had seen transpire between his attorney, the prosecutor and the judge, defendant pleaded guilty to murder. He pleaded guilty not because he realized he had killed his victim with malice rather than in the heat of passion, but because he was taking the best possible alternative—a maximum of two years imprisonment. And yet the Supreme Court of Pennsylvania has stated that he made his decision voluntarily, and with no misapprehension. Would he have made this decision so "voluntarily" if he had known what the outcome was to be? The answer is obvious, but the court will not let him make his choice from hindsight. It is difficult to believe that this is the same court which in *Commonwealth v. Evans*[86] recognized the danger of a judge being present during the discussion of a plea bargain, whether he participates in the actual bargain or not. The conclusion of Justice Roberts aptly states the pitfalls of not only the *Culbreath* decision, but the entire process of plea bargaining.

> Appellant was merely the victim of an admitted plea bargain which he thought would bind the judge. Certainly it cannot matter that the judge, unbeknownst to appellant, was not aware of the plea bargain and was not in any way bound by the agreement. Such a misunderstanding can occur easily and we should not penalize appellant for it.[87]

Conclusion

It must again be stressed that plea bargaining is not a totally onerous procedure. It is an effective answer to relieving our crowded courts. The problems lie with the means to that end. It is this author's contention that the most formidable problem is the failure to recognize that dangers do exist. The courts must recognize that even though a trial judge may not actually participate in the bargaining process, his mere awareness of it may indicate to the defendant that he has acquiesced. This belief can remain despite any instructions to the contrary.

86. 434 Pa. 52, 252 A.2d 689 (1969).
87. Commonwealth v. Culbreath, 439 Pa. 21, 33-34, 264 A.2d 643, 649 (1970).

They must be cognizant of dangers such as the irreconcilable results and misuse to which plea bargaining is subject.

Most importantly, the courts must be honest with themselves in assessing the true impact of plea bargaining in the voluntariness and understanding of a guilty plea. As mentioned previously, the basic premise of plea bargaining is that the defendant is guilty. If it is said that the defendant is guilty because the trial judge has examined the evidence and come to that conclusion from his knowledge of life and the law, the decision he makes can be justified in the name of a more efficient judical system. Even though our notions of due process may be frustrated in the process, it might well be the price we must pay for a society of two hundred million people. At least the courts would be facing the real issue. But if it is said that the defendant is guilty because he has wisely and voluntarily chosen to plead that way, then the courts have closed their eyes to the realities of human nature. They have placed the judicial system upon a merry-go-round tempting all who dare, innocent and guilty alike, to grab for the brass ring.

ROBERT W. MCCLURE